

Mayban Trustees Bhd v Bayan Bay Development Sdn Bhd & Ors A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02-1254 OF 2004

DENIS ONG, HASHIM YUSOFF AND ZULKEFLI JJCA
29 JUNE 2007

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Companies and Corporations — Arrangement, scheme of — Arrangement between company and creditors — Opposed by appellant — Appellant a trust corporation registered pursuant to Trust Companies Act 1949 — Whether appellant could be classified under a category of its own

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The appellant (the seventh intervener in the court below) appealed against the decision of the learned judge in allowing the first and second respondents' (the petitioners in the court below) petition for sanction of the scheme of compromise and arrangement ('SCA') between them and their creditors under section 176 of the Companies Act 1965 ('the Act'). The second respondent was a wholly owned subsidiary of the first respondent. The first respondent was the joint venture vehicle of Anson Perdana Berhad and Penang Development Corporation ('PDC') to develop a shopping mall, housing accommodation, shop offices and a yacht club. Due to the financial crisis in 1997, the first respondent and second respondent were unable to continue and complete the proposed development. The Mayban Trustees Bhd v Bayan Bay Development Sdn Bhd & Ors first respondent and second respondent entered into a single composite scheme of arrangement with their respective creditors in accordance with their legal rights and claims. The appellant as trustee for members who bought membership of the club commenced legal proceedings against the first and second respondents for the repayment of the sum of RM9,428,661 being the membership fees paid by the trustee from its trust account to the second respondent. The SCA was a single composite scheme of arrangement that included the settlement of the debts of the second respondent. The appellant was recognized as an unsecured creditor in the SCA by the first respondent for the same debt that was also claimed against the second respondent. The first to the sixth interveners (the third to the eighth respondents) supported the petition and sought approval of the court for the SCA but it was opposed by the appellant. It was argued for the appellant that the court should consider the appellant's position as a trustee for the members of the club in its capacity as a trust corporation registered pursuant to the Trust Companies Act 1949 ('the TCA') and that the membership fees referred to in the trust deed and disbursed to the second respondent could not be classified as unsecured creditors for the purposes of a s 176 scheme as envisaged by Part VIII of the Act.

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Held, dismissing the appeal with costs:

- (1) The court did not think that the monies claimed by the appellant were trust

- A** monies. The appellant's monetary claim was for the refund of the membership fees. Under the terms of the trust deed, the appellant was the trustee and not the first and second respondents. When the membership fees were first paid to the appellant, the appellant was under a legal obligation to place the membership fees in trust accounts to be released to the second respondent (see para 7).
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- (2) Section 16 of TCA had no relevance to the first and second respondents' scheme of arrangement. The first and second respondents were not trust corporations. The monies once released by the appellant pursuant to the terms of the trust deed would no longer be monies held on trust by the appellant and could not be trust money (see paras 8–9).
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- (3) The appellant was in fact an unsecured creditor and was estopped from saying otherwise for the following reasons: (i) the appellant claimed for the monies and filed the legal action in 2002 against the first and second respondents before the SCA was proposed; (ii) the appellant filed its proof of debt with the second respondent as an unsecured creditor of the first and second respondents; (iii) the appellant attended the creditors meeting, participated and voted against the SCA; (iv) obtained leave to intervene and became an intervener in these proceedings by reason that the appellant was an unsecured creditor (see para 10).
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- E** (4) The club members and the appellant had no proprietary right or any interest whatsoever over the assets of the club. The club members merely had the bare right to enter the club to use and enjoy in common with other members the facilities of the club during the period of the licence granted subject to compliance with the rules governing such use. Under the membership agreement the respective members had no legal right to seek any repayment or refund of the membership fees from the second respondent. The legal right to such repayment or refund of the membership fees rests with the appellant under the trust deed. Accordingly the respective members had no legal right or claims against the first and second respondents. This was evident from the legal action that was commenced by the appellant against the first and second respondents and not by the individual members (see para 13).
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[Bahasa Malaysia summary]

- H** Perayu (pencelah yang ketujuh di mahkamah di bawah) merayu terhadap keputusan hakim yang bijaksana yang membenarkan responden pertama dan kedua (pempetisyen-pempetisyen di mahkamah di bawah) petisyen untuk kebenaran satu Mayban Trustees Bhd v Bayan Bay Development Sdn Bhd & Orsskima kompromi dan pengurusan ('SKP') di antara mereka dan pemiutang-pemiutang mereka di bawah s 176 Akta Syarikat 1965 ('Akta tersebut'). Responden kedua adalah subsidiari yang dimiliki sepenuhnya oleh responden pertama. Responden pertama adalah kenderaan usahasama Anson Perdana Berhad dan untuk memajukan satu pusat beli-belah, rumah kediaman, kedai pejabat dan satu kelab pelayaran. Disebabkan oleh krisis kewangan di 1997, responden pertama dan responden kedua tidak dapat meneruskan dan menyiapkan cadangan pemajuan tersebut. Responden pertama dan responden kedua telah memasuki satu skema pengurusan komposit
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dengan pemiutang-pemiutang mereka masing-masing mengikut tuntutan dan hak-hak undang-undang mereka. Perayu sebagai pemegang amanah untuk ahli-ahli yang telah membeli keahlian kelab tersebut telah memulakan prosiding undang-undang terhadap responden pertama dan kedua untuk pembayaran jumlah RM9,428,661 yang merupakan yuran keahlian yang telah dibayar kepada pemegang amanah daripada akaun amanahnya kepada responden kedua. SKP adalah satu skema pengurusan komposit yang termasuk penyelesaian hutang-hutang responden kedua. Perayu dikenali sebagai pemiutang tak bercagar di dalam SKP oleh responden pertama untuk hutang yang sama yang dituntutnya terhadap responden kedua. Pencelah-pencelah pertama sehingga keenam (responden ketiga sehingga kelapan) menyokong petisyen tersebut dan memohon kebenaran mahkamah untuk SKP tersebut tetapi ia ditentang oleh perayu. Hujahan perayu adalah bahawa mahkamah sepatutnya pertimbangkan kedudukan perayu sebagai seorang pemegang amanah untuk ahli-ahli kelab tersebut dalam kapasitinya sebagai satu perbadanan amanah yang didaftarkan menurut Akta Pemegang Amanah 1949 (APA tersebut) dan yuran keahlian yang dirujuk di suratikatan amanah dan dibayar kepada responden kedua tidak patut diklasifikasikan sebagai pemiutang tak bercagar untuk tujuan s 176 skema yang dijangka oleh Bahagian VIII Akta tersebut.

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Diputuskan, menolak rayuan tersebut dengan kos:

- (1) Mahkamah tidak berpendapat bahawa wang yang dituntut oleh perayu adalah wang amanah. Tuntutan wang perayu adalah untuk pembayaran balik yuran keahlian. Di bawah terma-terma suratikatan amanah, perayu adalah pemegang amanah dan bukannya responden pertama dan kedua. Apabila yuran keahlian telah dibayar kepada perayu, perayu adalah di bawah obligasi di sisi undang-undang untuk meletakkan yuran keahlian ke dalam akaun amanah untuk dikeluarkan kepada responden kedua (lihat perenggan 7).
- (2) Seksyen 16 APA tiada kaitan dengan skema pengurusan responden pertama dan kedua. Responden pertama dan kedua bukannya satu perbadanan amanah. Wang yang sebaik sahaja diberikan oleh perayu menurut terma-terma suratikatan amanah tidak akan lagi menjadi wang yang dipegang di bawah amanah oleh perayu dan bukan lagi wang amanah (lihat perenggan 8–9).
- (3) Perayu sebenarnya adalah pemiutang tak bercagar dan diestop daripada menyatakan sebaliknya atas alasan-alasan berikut: (i) perayu menuntut untuk wang dan telah memfailkan tindakan undang-undang pada 2002 terhadap responden pertama dan kedua sebelum SKP tersebut dicadangkan; (ii) perayu telah memfailkan bukti hutangnya dengan responden kedua sebagai pemiutang tak bercagar responden pertama dan kedua; (iii) perayu menghadirkan diri di mesyuarat pemiutang, menyertai dan mengundi terhadap SKP tersebut; (iv) memperoleh kebenaran untuk mencelah dan telah menjadi pencelah di dalam prosiding-prosiding ini yang disebabkan oleh perayu sebagai pemiutang tak bercagar (lihat perenggan 10).
- (4) Ahli-ahli kelab dan perayu tidak mempunyai hak ketuanpunyaan ataupun sebarang kepentingan atas aset-aset kelab tersebut. Ahli-ahli kelab hanya mempunyai hak untuk memasuki kelab tersebut dan menggunakan fasiliti-fasiliti kelab dalam tempoh lesen yang diberikan tertakluk kepada

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- A** kepatuhan peruntukan-peruntukan penggunaan tersebut. Di bawah perjanjian keahlian ahli-ahli masing-masing tidak mempunyai hak di segi undang-undang untuk menuntut pembayaran balik yuran keahlian daripada responden kedua. Hak undang-undang terhadap pembayaran balik yuran keahlian tersebut adalah dengan perayu di bawah suratikatan amanah. Dengan itu, ahli-ahli
- B** masing-masing tidak mempunyai hak undang-undang ataupun tuntutan terhadap responden pertama dan kedua. Ini adalah jelas daripada tindakan undang-undang yang dimulakan oleh perayu terhadap responden pertama dan kedua dan bukannya ahli-ahli individu (lihat perenggan 13).]

- C** **Notes**
For a case on arrangement between company and creditors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 23.

- D** **Legislation referred to**
Companies Act 1965 ss 88, 95, 176
Courts of Judicature Act 1964 s 42
Housing Developers (Control and Licensing) Act 1966
Trust Companies Act 1949 s 16

- E** **Appeal from:** Petition No MTI-26-9 of 2004 (High Court, Pulau Pinang)
Datuk N Chandran (Chan Kok Keong, Norazali Nordin with him) (Chan & Associates) for the appellant.
Tang Woh Heng (TS Chin with him) (Arifln & Partners) for the first and second respondents.
- F** *Mathew Thomas Philip (Thomas Philip) for the third respondent.*
The fifth to eighth respondents not represented.
Selvarajah (Derek Fernandez with him) for the proposed intervenor.

- G** **Zulkefli JCA (delivering judgment of the court):**

INTRODUCTION

- H** [1] This is an appeal by the appellant ('the seventh intervenor in the court below') against the decision of the learned judge of the High Court at Penang in allowing the first and second respondents' ('the petitioners in the court below') petition for sanction of the scheme of compromise and arrangement ('SCA') between them and their creditors under s 176 of the Companies Act 1965 ('the Act'). Section 176(1) of the Act provides as follows:

- I** Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs.

FACTS OF THE CASE

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[2] The relevant background facts of the case are as follows:

- (i) The second respondent is a wholly owned subsidiary of the first respondent. The first respondent is the joint venture vehicle of Anson Perdana Berhad and Penang Development Corporation ('PDC') to develop a shopping mall, housing accommodation, shop offices and a yacht club ('the Club') in the Bayan Lepas area in Pulau Pinang. The PDC has 30% share in the first respondent. B
- (ii) Due to the financial crisis in 1997, the first respondent and second respondent were unable to continue and complete the proposed development. The first respondent and second respondent entered into a single composite scheme of arrangement with their respective creditors in accordance with their legal rights and claims. C
- (iii) On 11 December 2002, the appellant as trustee for members who bought membership of the Club commenced legal proceedings in the High Court Kuala Lumpur (S-22-5-2003) against the first and second respondents for the repayment of the sum of RM9,428,661 being the membership fees paid by the trustee from its trust account to the second respondent, interest, general damages and costs by reason of the fact that the second respondent jointly with the first respondent failed to complete the Club and had abandoned the development of the Club. The Club members had lost the use of the facilities of the Club. The SCA is a single composite scheme of arrangement that included the settlement of the debts of the second respondent. The appellant was recognized as an unsecured creditor in the SCA by the first respondent for the same debt that was also claimed against the second respondent. D E
- (iv) On 13 May 2003, the first and second respondents applied to the High Court (OS D1-24-113-2003) for, inter alia, leave to call and convene meetings in respect of their creditors for the purpose of considering and passing the SCA proposed to be made between the first and second respondents and their respective creditors. Pending the meetings a restraining order was granted by the court on 22 May 2003, and by an order dated 13 August 2003 the court extended the validity of the restraining order. The first and second respondents were to be restructured in accordance with the SCA. The preferential creditors, unsecured creditors and contingent creditors of the respondents including the appellant, will be paid or derived such benefit according to the SCA. F G
- (v) The first to the sixth interveners (the third to the eighth respondents) supported the petition and sought approval of the court for the SCA but it was opposed by the appellant. The effect of the SCA is that the unsecured creditors of the first respondent shall receive cash distribution which will be a moratorium of enforcement of claims by the creditors in the SCA pending the completion of the project/shopping mall. The SCA upon sanction by the court and being implemented shall discharge all claims by creditors. The SCA H I

- A** satisfied the statutory requirement and was approved by the required 50% in majority of the creditors.

ISSUES

- B** [3] Before the learned judge of the High Court the questions for determination were focused mainly on the objection of the appellant to the SCA on the following issues:
- (i) whether the appellant can be classified under a category of its own;
 - C** (ii) whether the appellant has been excluded from the creditors meeting of the second respondent;
 - (iii) whether the appellant is only given one vote though it purported to represent the 291 Club members;
 - D** (iv) whether the scheme lacks bona fide; and
 - (v) whether the failure to build the Club constitutes a breach of trust and contravenes s 88 of the Act.

DECISION OF THE COURT ON APPEAL

- E** [4] It was argued for the appellant that the court should consider the appellant's position as a trustee for the members of the Bayan Bay Marina Club ('the second respondent') in its capacity as a trust corporation registered pursuant to the Trust Companies Act 1949 ('the TCA'). Reference was made to the trust deed which described the appellant as a company incorporated in Malaysia and registered as a trust corporation under the TCA. Learned counsel for the appellant in the appeal before us submitted that the position of the appellant as a trust corporation is of importance to this appeal as the TCA has entrenched in it a specific provision governing the manner of handling of trust monies by a trust corporation like the appellant here. The relevant part of s 16 of the TCA provides as follows:
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- G** All moneys,... received or held by any trust company in a fiduciary capacity shall always be kept distinct from those of the company, and in separate accounts,... so that at no time shall trust monies form part of or be mixed with the general assets of the company.
- H** [5] Based on the provision of s 16 of the TCA the appellant therefore contended that the membership fees adverted to in the trust deed in this case are such trust monies. All payments made out of the trust fund of the membership fees by the appellant in accordance with the terms of the trust deed dated 3 July 1996 will have to be considered in the light of this special position of the appellant as a trustee pursuant to the TCA. Clause 12 of the trust deed as contended by the appellant is in point here (see pp 952–953 of appeal record (Vol 1)).
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[6] It is the contention of the appellant that the membership fees referred to in the trust deed and disbursed to the second respondent cannot be treated as an ordinary debt of any other unsecured creditor. To the appellant the members of the intended

club as represented by the appellant cannot be classified as unsecured creditors for the purposes of a s 176 scheme as envisaged by Part VIII of the Act.

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[7] With respect to the above contention of the appellant I do not think that the monies claimed by the appellant are trust monies. The appellant's monetary claim is for the refund of the membership fees. Under the terms of the trust deed, the appellant is the trustee and not the first and second respondents. When the membership fees were first paid to the appellant the appellant was under a legal obligation to place the membership fees in trust accounts to be released to the second respondent (see recital vii, cll 8 and 12 of the trust deed).

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[8] It is my view that s 16 of the TCA referred to by the appellant is applicable to the appellant as a trust corporation to ensure that the appellant keeps trust money separate from its own assets. This is to ensure that should the appellant be wound up or carry out a scheme of arrangement the monies held on trust by the appellant would remain out of reach of the creditors of the appellants. Section 16 of the TCA has no relevance to the first and second respondents' scheme of arrangement. The first and second respondents are not trust corporations.

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[9] The purpose and intent of the trust deed is to appoint the appellant as a stakeholder or trustee of the membership fees pending completion of the development of the Club to ensure that the membership fees were used solely to pay the expenses incurred by the second respondent in the development of the Club. The appellant was authorized by the parties to the trust deed to release such amount of the membership fees sufficient to pay the sums stipulated in the architect's certificate. The trust account here can be treated as being similar to the Housing Developer's Account ('HDA account') under the Housing Developers (Control and Licensing) Act 1966 (Act 118) where the purchase price paid by the purchaser of a house is paid to the HDA account to be released progressively to pay for the construction of the house. The monies once released by the appellant pursuant to the terms of the trust deed would no longer be monies held on trust by the appellant and cannot be trust money.

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[10] Learned counsel for the appellant also argued that the appellant is entitled to full recovery of the monies paid to the second respondent in accordance with the trust deed. In my view this cannot be the case. If the first and second respondents were wound up (there being no scheme) the appellant's debt would rank *pari passu* with the other unsecured creditors, otherwise there will be an undue preference in favour of the appellant. The appellant is not a preferential creditor. In a winding up there are only three classes of creditors; the preferential creditors, the secured creditors and the unsecured creditors. The appellant is not a preferential creditor and is also not a secured creditor. The appellant is in fact an unsecured creditor and is estopped from saying otherwise for the following reasons:

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- (i) the appellant claimed for the monies and filed the legal action in 2002 against the first and second respondents before the SCA was proposed;

- A** (ii) the appellant filed its proof of debt with the second respondent as an unsecured creditor of the first and second respondents (see exh MTB 10 at pp 1088–1091 of the appeal record (Vol 4));
- (iii) the appellant attended the creditors meeting, participated and voted against the SCA;
- B** (iv) obtained leave to intervene and became an intervener in these proceedings by reason that the appellant is an unsecured creditor.

C [11] For the above stated reasons I find the appellant’s argument that the monies claimed is trust money is misconceived and without basis. The appellant is an unsecured creditor and is properly classified as an unsecured creditor.

D [12] It is also the contention of the appellant that the individual Club members should be the creditors and not the appellant. In my view if this is the case then the appellant has no locus standi. On this point I find the learned trial judge had made correct findings of fact wherein in his grounds of judgment he had, inter alia, stated as follows:

- (i) The club members through the appellant opted under the trust deed to pursue a refund of the monies they paid towards membership fees which is a monetary claim and this is the same with any other unsecured creditor.
- E** (ii) Having participated in the meeting the appellant’s objection that it has been excluded from the meeting of the second respondent is misplaced.
- (iii) The Club members having chosen to pursue a monetary claim against the first and second respondents through the appellant cannot now claim to be recognized as another class of creditors under the scheme as to be entitled to attend in their individual capacity as members of the Club and to vote therein.
- F** It is the appellant who had assumed the role of the creditor for and on behalf of the individual members and such creditor was entitled to one vote.

G [13] It is my view the Club members and the appellant have no proprietary right or any interest whatsoever over the assets of the Club. The Club members merely have the bare right to enter the Club to use and enjoy in common with other members the facilities of the Club during the period of the licence granted subject to compliance with the rules governing such use (see cl 6.2 of the membership agreement). Under the membership agreement the respective members have no legal right to seek any repayment or refund of the membership fees from the second respondent. The legal right to such repayment or refund of the membership fees rest with the appellant under the trust deed. Accordingly the respective members have no legal right or claims against the first and second respondents. This is evident from the legal action that was commenced by the appellant against the first and second respondents and not by the individual members.

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[14] It was also argued for the appellant that the order dated 2 November 2004 sanctioning the SCA had resulted in the trust deed being terminated. I do not agree with such a contention. The order did not terminate the Trust Deed. It is only the membership agreement that is deemed to be terminated as the SCA provides for the

refund of the membership fees in part in common with the other unsecured creditors. This is part of the proposal contained in the SCA that was considered by the creditors and approved by the creditors.

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[15] Learned counsel for the appellant submitted that any termination or winding up of a trust as created by the trust deed can only be brought about in strict compliance with the provision under s 95 of the Act. Clause 17 of the trust deed which deals with the 'Duration of Scheme and Termination' as contended by learned counsel for the appellant made specific reference to the said s 95 of the Act. With respect I do not find s 95 of the Act and cl 17 of the trust deed are relevant in the context of the argument of learned counsel for the appellant. Section 95 of the Act requires the appellant as trustee to summon a meeting of the members to discuss the winding up of the scheme. Clause 17.2 of the trust deed provides for the appellant as trustee to terminate the operation of the Club by giving six months notice. Clause 17.3 of the trust deed provides that if the Club is not yet completed the appellant as trustee shall in the event of the determination and winding up of the scheme institute legal proceedings against the second respondent to secure the repayment or refund of the membership fees for the remaining period of the unutilized period. The appellant had already commenced the legal action in 2002 and it must be assumed that the appellant as trustee had complied with s 95 of the Act and with the provision of cl 17.3 of the trust deed. The appellant is estopped from saying otherwise.

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[16] With regard to the appellant's contention that the SCA lacks bona fide the learned trial judge was right in finding that this is a mere allegation as there is no cogent evidence to support it. I also find the appellant's allegation of breach of trust and contravention of s 88 of the Act against the first and second respondents which premised on the fact that the Club would not be built is wholly misconceived and without merit. It must be noted that the said members of the Club have invoked and opted for their right under the trust deed to have the appellant as their trustee to institute legal proceedings against the respondents to claim for the refund of the membership fees paid to the second respondent.

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CONCLUSION

[17] For the reasons already given I would dismiss the appellant's appeal with costs and order the deposit to be paid to the respondents on account of taxed costs.

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[18] My learned brother Hashim Yusoff (now FCJ) has seen this judgment in draft and has conveyed his agreement thereto. A member of the panel who was the Chairman which heard this appeal, Denis Ong JCA went on retirement on 3 June 2007 but has not indicated his decision on this appeal. This judgment is therefore a majority judgment that is in accordance with s 42 of the Courts of Judicature Act 1964.

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Appeal dismissed with costs.

Reported by Sally Kee

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